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Supreme Court of the United States

OCTOBER TERM, 1920.

No.  12

LOUIS H. EBERLEIN,

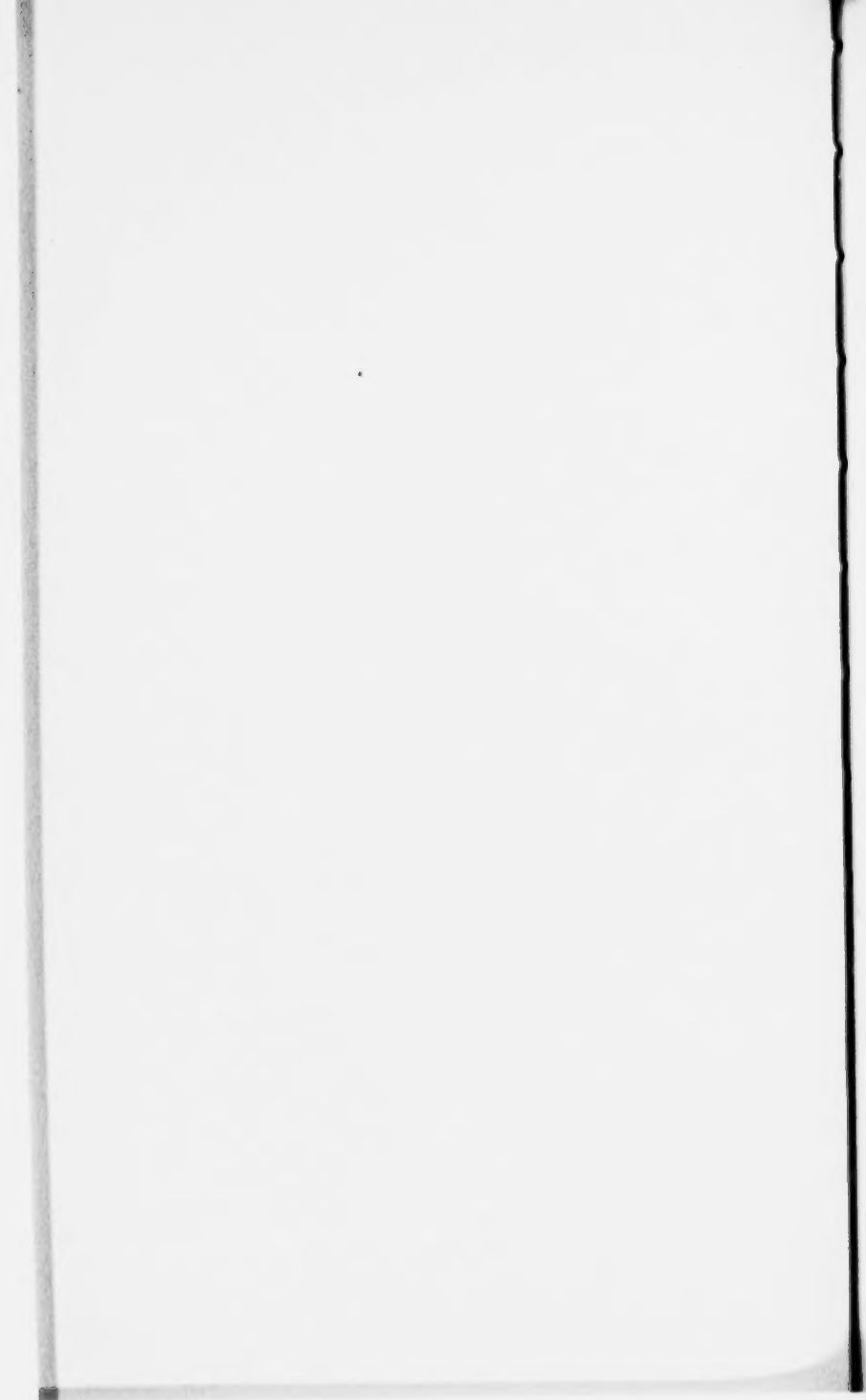
Appellant,

against

THE UNITED STATES.

APPELLANT'S REPLY BRIEF

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Supreme Court of the United States,

OCTOBER TERM, 1920.

LOUIS H. EBERLEIN,

Appellant,

against

THE UNITED STATES.

No. 49.

APPELLANT'S REPLY BRIEF.

I.

Opposing counsel's argument (pp. 2-8) is based upon the assumption that our contention is that the President is the appointing power and that he ordered appellant's reinstatement. This is an error. We have not made any such contention. On the contrary, our position is (pp. 5, 6, 7 and 10) that the Secretary of the Treasury is the appointing, removing and reinstating authority and so we are in harmony with the argument of the defense on this point. The President's order (R. foot of p. 5) was permissive in form "may be reinstated", etc. The Secretary of the Treasury acted on the permission so given and restored appellant to his former position. The Executive order, R. 2, distinctly states in the last paragraph but one, "*the Department reached the conclusion that Mr. Eberlein's dismissal from the service was not justified and that his reinstatement would be in the interests of good administration.*" Clearly, this indicates that the

Secretary of the Treasury, the appointing power, was the one who finally determined that Eberlein was innocent. The Executive order did not purport to restore Eberlein to his office and no such contention is made by the appellant. As stated in the brief of the United States, the effect of the Executive order was to waive a civil service rule which prevented a restoration to office where the incumbent had been separated therefrom for more than a year. Eberlein was restored to duty by the direction of the appointing power. It is true that the Court of Claims, in its opinion (R. 7) states that the President directed the reinstatement of the plaintiff, but we take it that the court below did not intend to hold that Eberlein was restored solely by virtue of the Executive order and without the intervening act of the appointing power, the Secretary of the Treasury. It is likewise true that the President reached the conclusion that Eberlein was innocent, but he merely restated the views of the appointing power. We find no quarrel with the defendant's argument that the power of removal is incident to the power of appointment and that the power of appointment of subordinate customs officers and employees is vested in the Secretary of the Treasury. The defense proceeds upon the theory that Eberlein was reappointed and not reinstated. It may well be that the word "reinstated" was used in the Executive order in a loose sense, but whatever may have been the intent in the use of this word, the fact remains, as the record discloses, that Eberlein was restored to duty pursuant to a proper direction from the appointing power.

II.

Eberlein was restored to his "former position" (R. 7) by the Collector of Customs. It must be presumed that the Collector acted within the authority of his office. He is, by law, the proper nominating officer for the customs service (Article 1370, Customs Laws and Regulations of 1908). It is to be noted that Eberlein was restored to his *former position* and not to some other position. He was not required to take a new oath of office but was merely placed on active duty again. He was treated as a suspended employee only, for, had he been regarded as a new appointee, a new oath of office would have been required of him.

III.

The salary of his office was not paid to any other incumbent so far as the record shows, and the inference is that the office was vacant during the entire two years of his separation from the service. The petition (R. 3, top of page) alleges that on "the 16th day of December, 1912 claimant was restored to his position as United States storekeeper at \$1600.00 per annum". Finding VII, R. 6, is as follows:

"If plaintiff is entitled to the salary of his office from May 9th, 1910 to December 15th, 1912, the same would amount to \$4164.44."

Thus the court excluded December 16th, 1912, the date of restoration, and named dates that cover the period between the removal and the date of

restoration, taking pains to exclude the latter date in order that Eberlein would not get two days' pay for December 16th, 1912. Thus the court below fixed the period in which claimant had not drawn pay.

We submit that this finding fixes the date of restoration, especially when we recognize the fact that the Secretary would naturally, inevitably and promptly act in accordance with the President's permission, as the Secretary had previously established and found, as a fact, that Eberlein had been removed without *just cause*. The Court of Claims would not have computed the salary down to December 15th, 1912, if there had not been restoration on the following day, but we are not left in doubt on that point for it is stated in the opinion (top of page, R. 7) as follows:

"On December 3rd, 1912, the President, by an Executive order of that date, and in pursuance of a still further investigation of the matter, directed the reinstatement of the plaintiff, and, on December 16th, 1912, the Collector did reinstate him in his former position. This suit is to recover the salary of the office held by the plaintiff from the date of his removal therefrom to the date of his reinstatement."

This clarifies the finding and makes conclusive our interpretation of it. The court below states that the "Collector did reinstate him in the former position". Of course, that was done in harmony with Article 1370 of the Customs Laws and Regulations of 1908 authorizing the Collector to act by permission of the Secretary of the Treasury. We take it that this court will presume that all

things were done in harmony with the law, in the absence of facts showing the contrary. It is true that the record does not disclose a precise direction from the Secretary of the Treasury to the Collector to restore Eberlein to his former position, but it does appear that he was so restored by the proper nominating officer, the Collector of Customs, and, applying the presumption above stated, it follows that Eberlein was restored by the Secretary of the Treasury.

Conclusion.

Since the causes for Eberlein's removal were reviewed by the appointing power and it was found that there was no just cause for removal, it follows that this appeal presents no question of reviewing the acts of an administrative official in the discharge of his duties; since Eberlein was restored to his former position without being required to execute a new oath of office, it follows that his restoration carried with it the title to the office "*ab initio*"; and, since the salary of his office was not paid to another incumbent, it follows that Eberlein is entitled to the same, as the salary is an incident of the office. We, therefore, submit that Eberlein is entitled to judgment for the amount mentioned in Finding VII, R. 6; namely, \$4164.44.

Respectfully submitted,

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